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Datin Seri Rosmah bt Mansor v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-07–79–09 OF 2021
KAMALUDIN MD SAID, NORDIN HASSAN AND HASHIM HAMZAH JJCA
29 NOVEMBER 2020

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Criminal Procedure — Trial — Stay of proceedings — Appellant applied for stay of proceedings pending disposal of appeal against High Court rulings — Whether appeal would be rendered nugatory if stay not granted — Whether High Court rulings appealable — Whether there were special circumstances for stay to be granted — Criminal Procedure Code s 172B(4)

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The applicant was charged with two corruption offences under the Malaysian Anti-Corruption Commission Act 2009 in the High Court at Kuala Lumpur. An oral application for stay of the proceedings was dismissed by the trial judge. The appellant then filed a notice of motion for an order that the Criminal Proceedings No WA-45–9–03 of 2019 and WA-45–19–07 of 2019 be stayed pending the disposal of the appellant's appeals against the ruling of the learned High Court judge in dismissing the appellant's applications to nullify the appellant's trial and to disqualify the lead prosecutor Datuk Gopal Sri Ram ('DGSR') from conducting and leading the prosecution. The appellant's grounds for stay of proceedings were as follows: (a) if stay was not granted and if the appellant's appeal was allowed by the Court of Appeal, it would render the appeal nugatory. As such, it was a waste of time and efforts by all parties for the continuation of the trial; (b) the decision of the High Court judge was appealable to the Court of Appeal without having to wait for the court's decision at the end of the defence case; (c) there was a novel question of law in the said appeal which concerned the legality of the proceedings against the appellant; (d) the legality of the appointment of DGSR as senior deputy public prosecutor by fiat should be determined first by the Court of Appeal and/or Federal Court before the prosecution against the appellant; (e) the appellant's rights for fair and impartial trial would be prejudiced if a stay of proceedings was not granted; and (f) there were special circumstances for granting the stay of proceedings.

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Held, dismissing the appeal:

(1) The main contention by counsel for the applicant was that the proceedings at the High Court might be rendered a nullity if their appeal to the Court of Appeal was successful. This was due to the fact that the

legality of the proceedings and the legality of the appointment of DGSR as the lead prosecutor were the subject matter of the appellant's appeal. The court was of the view that the argument that the proceedings may be rendered a nullity was not a special circumstance and as such it did not support the appellant's application for the stay of proceedings (see para 11).

(2) The court considered public interest which dictated that the trial of serious offences, especially by a public figure was to be resolved expeditiously without interruption or fragmentation by interlocutory appeal. Moreover, the hearing of the applicant's proceedings had already commenced which needed to be completed without delay. Besides, it was also in the best interest of the appellant if the trial was resolved as soon as possible where the appellant had the opportunity to put her defence and clear her name if she was innocent (see para 12).

(3) The expeditious completion of a criminal trial was in tandem with the intention of the Parliament when s 172B of the Criminal Procedure Code ('the CPC') was enacted and came into effect on 1 June 2012. Section 172B(4) of the CPC required a trial to commence no later than three months after an accused was charged. Clearly, a long delay including granting a stay of proceedings without exceptional or unusual circumstances would defeat the Parliament's intention. Further, the applicant's rights over the High Court judge's rulings were best vindicated by an appeal after a full trial and if convicted, with the benefit of all relevant facts which were placed before the trial judge. There was no miscarriage of justice in the circumstances. The applicant had not shown any exceptional or unusual circumstances to justify the stay application (see paras 13, 15 & 17).

[Bahasa Malaysia summary

Pemohon telah dituduh di bawah dua kesalahan rasuah di bawah Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 di Mahkamah Tinggi di Kuala Lumpur. Permohonan lisan untuk penangguhan prosiding telah ditolak oleh hakim bicara. Perayu kemudian memfailkan notis usul untuk perintah supaya Prosiding Jenayah No WA-45–9–03 Tahun 2019 dan WA-45–19–07 Tahun 2019 ditangguhkan sementara menunggu pelupusan rayuan perayu terhadap keputusan hakim Mahkamah Tinggi yang menolak permohonan perayu untuk membatalkan perbicaraan perayu dan mengecualikan timbalan pendakwa raya utama Datuk Gopal Sri Ram ('DGSR') daripada menjalankan dan mengetuai pihak pendakwaan. Alasan perayu untuk penangguhan prosiding adalah seperti berikut: (a) sekiranya penangguhan tidak diberikan dan jika rayuan perayu dibenarkan oleh Mahkamah Rayuan, ianya akan menyebabkan rayuan tersebut sia-sia. Oleh itu, ianya merupakan satu pembaziran masa oleh semua pihak untuk meneruskan perbicaraan; (b) keputusan hakim Mahkamah Tinggi telah dirayu ke Mahkamah Rayuan tanpa perlu menunggu keputusan

mahkamah pada akhir kes pembelaan; (c) terdapat persoalan undang-undang baru di dalam rayuan tersebut yang berkenaan dengan kesahihan prosiding ini terhadap perayu; (d) kesahan pelantikan DGSR sebagai timbalan pendakwa raya kanan secara fiat hendaklah ditentukan terlebih dahulu oleh Mahkamah Rayuan dan/atau Mahkamah Persekutuan sebelum pendakwaan dilakukan terhadap perayu; (e) hak perayu untuk perbicaraan yang adil dan tidak berat sebelah akan diprejudiskan sekiranya penangguhan prosiding ini tidak diberikan; dan (f) terdapat keadaan khas untuk membenarkan penangguhan prosiding.

Diputuskan, menolak rayuan:

(1) Hujahan utama oleh peguam pemohon adalah prosiding di Mahkamah Tinggi boleh terbatal sekiranya rayuan mereka ke Mahkamah Rayuan berjaya. Hal ini disebabkan oleh kesahihan prosiding dan kesahihan pelantikan DGSR sebagai timbalan pendakwa raya utama adalah isu asas rayuan perayu. Mahkamah berpendapat bahawa hujahan prosiding tersebut boleh menjadi sia-sia bukanlah keadaan khas dan tidak dapat menyokong permohonan perayu untuk penangguhan prosiding (lihat perenggan 11).

(2) Mahkamah mempertimbangkan kepentingan awam yang mana perbicaraan kesalahan serius yang melibatkan orang yang terkenal haruslah dilupuskan secara segera tanpa gangguan oleh rayuan interlokutori. Selain itu, pendengaran prosiding pemohon telah pun bermula yang perlu diselesaikan tanpa berlengah-lengah. Selain itu, ianya juga baik untuk demi kepentingan perayu sekiranya perbicaraan tersebut diselesaikan secepat mungkin di mana perayu mempunyai peluang untuk meletakkan pembelaannya dan membersihkan namanya sekiranya dia tidak bersalah (lihat perenggan 12).

(3) Pelupusan segera perbicaraan jenayah adalah selaras dengan niat Parlimen apabila s 172B Kanun Tatacara Jenayah ('KTJ') diluluskan dan berkuatkuasa 1 Jun 2012. Seksyen 172B(4) KTJ menyatakan bahawa perbicaraan jenayah harus dimulakan tidak lewat daripada tiga bulan selepas tertuduh didakwa di mahkamah. Jelasnya, kelewatan yang panjang termasuk penangguhan prosiding tanpa keadaan luar biasa bercanggah dengan niat Parlimen. Selanjutnya, hak pemohon terhadap keputusan hakim Mahkamah Tinggi sepatutnya diselesaikan ketika rayuan selepas perbicaraan penuh dan sekiranya disabitkan, dengan semua fakta yang relevan di hadapan hakim bicara. Tiada kegagalan proses keadilan dalam keadaan kes ini. Pemohon tidak menunjukkan sebarang keadaan yang luar biasa untuk permohonan penangguhan ini dibenarkan (lihat perenggan 13, 15 & 17).]

Cases referred to

Leong Poh Shee v Ng Kat Chong [1966] 1 MLJ 86, HC (folld)
PP v Dato' Sri Mohd Najib bin Hj Abd Razak [2019] 4 MLJ 421, FC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001
Criminal Procedure Code ss 51A, 172, 172B, 172B(4)
Malaysian Anti-Corruption Commission Act 2009
Penal Code

Appeal from: Criminal Trial Nos WA-45–9–03 of 2019 and WA-45–19–07 of 2019 (High Court, Kuala Lumpur)

Jagjit Singh a/l Vasawa Singh (Hj Akberdin bin Hj Abdul Kader, Hj Azrul bin Zulkifli Stork, Meor Hafiz bin Salehan, Ummi Kartini bt Bad Latiff, Ardy Suffian bin Hj Akberdin and Azalea Nazihah bt Zulkefli with him) (Akberdin & Co) for the appellant.
Gopal Sri Ram (Ahmad Akram Gharib, Mohamad Mustaffa P Kunyalam, Deepa Nair Thevaharan, Poh Yih Tinn and Fariza Amira Azman with him) (Attorney General's Chambers) for the respondent.

Nordin Hassan JCA:

[1] The applicant filed a notice of motion for an order that the criminal proceedings No WA-45–9–03 of 2019 and WA-45–19–07 of 2019 be stayed pending the disposal of the applicant's appeals against the ruling of the learned High Court judge in dismissing the applicant's applications to nullify the applicant's trial and to disqualify the lead prosecutor Datuk Gopal Sri Ram ('DGSR') from conducting and leading the prosecution. An oral application for stay of the proceedings was dismissed by the trial judge.

[2] The applicant was charged with two corruption offences under the Malaysian Anti-Corruption Commission Act 2009 in the High Court at Kuala Lumpur and the trial is at the defence stage which has been fixed for continuation of hearing on 5, 7, 21, 28 October 2021 and 15 November 2021.

[3] In the notice of motion, the appellant's grounds for stay of proceedings are as follows:

(a) if stay is not granted and if the applicant's appeal is allowed by the Court of Appeal, it would render the appeal nugatory. As such, it is a waste of time and efforts by all parties for the continuation of the trial;

(b) the decision of the High Court judge is appealable to the Court of Appeal without having to wait for the court's decision at the end of the defence case;

(c) there is a novel question of law in the said appeal which concerns the legality of the proceedings against the appellant;

(d) the legality of the appointment of DGSR as senior deputy public prosecutor by *fiat* should be determined first by Court of Appeal and/or Federal Court before the prosecution against the appellant;

(e) the appellant's rights for fair and impartial trial will be prejudiced if stay of proceedings is not granted; and

(f) there are special circumstances for granting the stay of proceedings.

[4] On this issue of stay of proceedings in a criminal trial, first and foremost, it relates to an exercise of judicial discretion and to succeed in such application, applicant must show the existence of exceptional and unusual circumstances for the stay of proceedings to be granted.

[5] The test of exceptional and unusual circumstances was succinctly explained by the Federal Court in the case of *Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak* [2019] 4 MLJ 421.

[6] Briefly, in that case, the respondent was charged before the High Court with seven charges under the Malaysian Anti-Corruption Commission Act 2009, the Penal Code and Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. Three appeals were filed by the respondent when the High Court judge dismissed the respondent's interlocutory applications which are as follows:

(a) to secure a 'gag order' restraining publication of the respondent's trial;

(b) to obtain documents other than those provided under s 51A of the Criminal Procedure Code; and

(c) to challenge the withdrawal by the public prosecutor of a transfer certificate to transfer the case to the High Court.

[7] The respondent then applied for the respondent's proceedings at the High Court to be stayed pending the disposal of the three appeals but was dismissed by the High Court judge. On appeal, the Court of Appeal granted the stay of proceedings but was overturned by the Federal Court which held that the respondent has failed to establish exceptional or unusual circumstances for stay of proceedings to be granted.

[8] The Federal Court has also laid down several important determinative principles in considering an application for stay of criminal proceedings. Richard Malanjum CJ (as he then was) in delivering the judgment of the court said this:

> [32] In summary, in considering an application for stay of criminal proceedings when commencement of the trial is imminent or continuing in the court of first instance, the determinative principles to be derived from the above cases are as follows:
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> (a) *there is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried* (*R v Crawley and others* [2014] EWCA Crim 1028 at para 18);
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> (b) *it is undesirable that the criminal process be interrupted or fragmented by interlocutory proceedings. The considerations of public interest are of great weight leaning in favour of expeditious resolution of accusations of crime;*
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> (c) *the undesirability of fragmenting the criminal process is not confined to any particular part of the criminal process, but rather to the process as a whole. Any interference with any part of the process is antithetical to the proper and just disposition of criminal cases.* The caution about the undesirability of fragmentation of criminal process would be more pronounced where a hearing of proceedings has actually commenced;
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> (d) *a stay of proceedings application will require especially compelling justification in a case qualifying for urgent judicial decision*. For instance, it is important that anyone charged with serious criminal offences be brought to trial expeditiously. *Public interest would not be served by allowing the defence to request for a delay. An accused of serious criminal offences who is not guilty should have the opportunity of clearing his name without excessive delay* (*Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68 at para 16);
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> (e) *a stay of proceedings will not normally be granted pending an interlocutory appeal in a criminal trial. It is only in very exceptional or unusual circumstances that a stay order is granted*. This is so even if the issuing of the interlocutory appeal is not opposed by the prosecution or in fact supported by both the prosecution and the defence;
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> (f) *the accused's rights over preliminary or interlocutory rulings made by the trial judge are best vindicated by appeal after conviction, if any*. It is generally more desirable to consider preliminary or interlocutory rulings made by the trial judge in appeal after conviction upon full trial with the benefit of a concrete factual setting than considering them in the abstract during interlocutory appeal;
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> (g) *the fact that an accused will be put to the expense of a trial is irrelevant and would not qualify as 'exceptional circumstances' to justify a stay of a criminal trial pending resolution of an appeal*; and
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> (h) *the courts should exercise great caution in allowing other forms of collateral challenge, in parallel proceedings* such as an application for a declaration or

other form of judicial review with similar relief in the nature of certiorari, be it commenced in the same court or another civil or criminal court, which have the net effect of staying the criminal proceedings or would interfere with or impinge directly upon the normal course of proceedings in a criminal trial. (Emphasis added.)

[9] In the same case, it was held that the fact a proceeding may be rendered a nullity is not a special circumstance and it is also irrelevant that the accused is put to the expense of a trial and eventually acquitted. The Federal Court had this to say:

[33] Now, the accused is a public figure who stands charged with offences which cannot by any means be described as trivial, allegedly committed while he was holding office as Prime Minister. Public interest, and indeed his personal interest, dictate that the trials against him should be commenced expeditiously without any unreasonable delay as it is at the denouement of the trial that the court is best-equipped to determine his guilt or otherwise based on factual evidence instead of speculative arguments. Furthermore, he has not established to our satisfaction that his application is so unusual or exceptional that it falls within that class of cases which would justify the grant of a stay. *As stated above, a stay of criminal proceedings will only be granted in the rarest of cases and the fact that the proceedings may be rendered a nullity is not a special circumstance. In the context of an application for a stay of proceedings, it is also immaterial that the accused is put to the expense of a trial even if he is subsequently vindicated on appeal.* (Emphasis added.)

[10] We noted that there is no exhaustive definition of special or exceptional circumstances but guidance can be made to the statement by Raja Azlan Shah (as His Majesty then was) in *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86:

Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. *It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.* (Emphasis added.)

[11] Reverting to the present application, the main contention by counsel for the applicant was that the proceedings at the High Court may be rendered a nullity if their appeal to the Court of Appeal is successful. This is due to the fact that the legality of the proceedings and the legality of the appointment of DGSR as the lead prosecutor *were* the subject matter of the applicant's appeal. In relation to this, as decided by the Federal Court in *Dato Sri Najib*'s case alluded to earlier, the proceedings may be rendered a nullity is not a special circumstance and as such it does not support the applicant's application for the stay of proceedings.

[12] We have also considered public interest which dictates that the trial of serious offence especially by a public figure to be resolved expeditiously without

A interruption or fragmentation by interlocutory appeal. Moreover, the hearing of the applicant's proceedings has already commenced which need to be completed without delay. Besides, it is also the best interest of the applicant if the trial be resolved as soon as possible where the applicant has the opportunity to put her defence and clear her name if she is innocent.

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[13] In addition, we find expeditious completion of a criminal trial is in tandem with the intention of the Parliament when s 172B of the Criminal Procedure Code ('the CPC') was enacted and came into effect on 1 June 2012. Section 172B(4) requires a trial to commence no later than three months after an accused was charged. Clearly, a long delay including granting stay of proceedings without exceptional or unusual circumstances will defeat the Parliament's intention.

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D **[14]** In proposing the Bill for the insertion of s 172, including s 172B(4) of the CPC, the Deputy Minister in the Prime Minister's Department in his statement which can be seen in Hansard dated 22 April 2010, said this:

> Datuk Liew Vui Keong: Tuan yang di-Pertua, sehingga hari ini peningkatan kes jenayah di mahkamah di negara ini adalah begitu mendadak. Berikutan itu terdapat banyak kes yang tertunggak di mahkamah jenayah dan ini boleh menjejaskan pentadbiran keadilan di Malaysia. Di bawah *common law* adalah menjadi prinsip asas bahawa keadilan yang dilengah-lengahkan adalah keadilan yang dinafikan dengan izin, *justice delayed is justice denied*. Perbicaraan yang terlalu lama bagi sesuatu kes jenayah akan menjejaskan hak individu yang dituduh dan seterusnya menjejaskan keterangan yang menjadi dasar bagi membuktikan sesuatu penghakiman. Kerajaan memandang serius perkara ini.
>
> Tuan yang di-Pertua, kerajaan telah mengkaji sebab-sebab yang boleh melambatkan perbicaraan kes jenayah dan mencari jalan supaya proses pendakwaan dan perbicaraan kes-kes tersebut boleh disegerakan. Sehubungan dengan itu kerajaan telah mencadangkan supaya sistem *speedy trial* dilaksanakan di Malaysia.
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> ...
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> *Sistem speedy trial ini bertujuan untuk memastikan kes-kes jenayah di mahkamah dapat diselesaikan dengan secepat mungkin dan untuk memastikan kes-kes jenayah tidak tertunggak untuk tempoh yang terlalu lama, sehingga menyebabkan pihak-pihak yang terlibat dalam proses pentadbiran keadilan jenayah dicabar sama ada di peringkat domestik ataupun antarabangsa*. Tuan yang di-Pertua, kerajaan telah mengkaji sama ada suatu perundangan yang khusus perlu diubah atau memadai untuk meminda perundangan yang sedia ada untuk memperuntukkan mengenai konsep *speedy trial* dan perkara-perkara yang berkaitan dengannya.
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> Setelah mengambilkira pelbagai aspek dan hasil kajian yang telah dijalankan, kerajaan telah memutuskan untuk meminda perundangan yang sedia ada iaitu meminda Kanun Tatacara Jenayah (Akta 593) untuk memperuntukkan mengenai *speedy trial yang akan memendekkan tempoh perbicaraan dan mempercepatkan proses pelupusan perbicaraan jenayah...*

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[15] Further, we are also of the view that the applicant's rights over the High Court judge rulings are best vindicated by an appeal after a full trial and if convicted, with the benefit of all relevant facts which were placed before the trial judge. We do not see any miscarriage of justice in the circumstances.

[16] On the issue that the applicant's appeal would be rendered nugatory, we find this contention is bereft of any merit. As mentioned earlier, a proceeding may be rendered a nullity and the applicant will be put to the expense of a trial are not special circumstances for the granting of stay proceedings. Therefore, the issue of nugatory of the applicant's appeal does not arise. In any event, the applicant would not be deprived the result of her appeal if successful.

[17] Having weighed all the grounds advanced by the applicant in the present application, we find, there is no compelling justification for this court to grant the stay of proceedings. The applicant has not shown any exceptional or unusual circumstances to justify the stay application.

[18] In the circumstances, it is our unanimous decision that the applicant's application for the stay of proceedings is dismissed.

Appeal dismissed.

Reported by Muhamad Azham Marwan